UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America,

Plaintiff,

and

State of Minnesota, by its Attorney General Hubert H. Humphrey, III, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

v.

Reilly Tar & Chemical Corporation; Housing and Redevelopment Authority of St. Louis Park; Oak Park Village Associates, Rustic Oaks Condominium, Inc., and Philip's Investment Co.,

Defendants,

and

City of St. Louis Park,

Plaintiff-Intervenor,

v.

Reilly Tar & Chemical Corporation,

Defendant,

and

City of Hopkins,

Plaintiff-Intervenor,

v.

Reilly Tar & Chemical Corporation,

Defendant.

Civil File No. 4-80-469

ORDER

* * * * * * * *

This matter comes before the court upon the appeal of Reilly Tar & Chemical Corporation from those portions of the July 12, 1984 Order of United States Magistrate Floyd E. Boline which granted the City's motion for an order compelling Reilly Tar to respond to requests for admission.

The court has reviewed the July 12, 1984 Order and finds that Magistrate Boline's rulings are not clearly erroneous or contrary to law. Accordingly,

IT IS ORDERED that the July 12, 1984 Order of Magistrate Boline is affirmed with the exception of that portion which requires that the Order be complied with within fifteen days. In light of the court's November 30, 1984 Case Management Order, paragraph 4, Reilly Tar will not be required to respond to the requests for admission ordered herein during the stay of discovery on Phase II issues, absent compelling reasons presented by St. Louis Park to the court as to why such discovery is required during Phase I.

Dated: December 17, 1984.

Paul A. Magnuson
United States District Judge

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ORDER

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This matter comes before the court upon the appeals of Reilly Tar & Chemical Corporation, the State of Minnesota and the City of St. Louis Park from the August 14, 1984 Order of United States Magistrate Floyd E. Boline which denied in part and granted in part Reilly Tar's renewed Motion to Compel Answers to deposition questions asked of Robert J. Lindall, Esq., and John B. Van de North, Jr., Esq., former counsel for the State of Minnesota; Gary R. Macomber, Esq., Rolfe A. Worden, Esq., and Wayne Popham, Esq., past or present counsel for the City of St. Louis Park; Dale Wikre, Clarence A. Johannes and Edward M. Wiik, past or present employees of the State of Minnesota; and Harvey McPhee, an employee of the City of St. Louis Park.

The issues raised on appeal challenge the Magistrate's conclusions of law in sustaining or overruling objections by the State and City based upon attorney-client privilege or the work product doctrine. Since the deposition questions pertain to state law claims or defenses to be determined under Minnesota law, Federal Rule of Evidence 501 requires that the issues of privilege on appeal be determined by reference to Minnesota law. Work product immunity is to be determined under federal law. Federal Rule Civil Procedure 26(b)(3).

The attorney-client privilege as it existed under the common law is codified at Minn. Stat. § 595.02(2) (1982). Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d 395, 397 (Minn. 1979). The elements generally recognized under the common law as a prerequisite to claiming the privilege are those enunciated in United States v. Shoe Machinery Corp., 89 F.Supp. 357, 358-59 (D.

Mass. 1950). In sum, only those confidential communications between an attorney and a client in seeking or rendering legal advice which are intended to remain confidential are subject to the privilege. Schwartz v. Wenger, 267 Minn. 40, 124 N.W.2d 489, 491-492 (1963). The protection of the privilege extends only to communications; it does not protect against disclosure of the underlying facts. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981). The policy in favor of full testimonial disclosure requires that the privilege be strictly construed. Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d at 399. In discussing the attorney-client privilege as a compatible exception to the Minnesota Open Meeting law, the Minnesota Supreme Court observed that a delicate balancing is required between the public's interest in access to public affairs and a governing body's ability to best serve the public need by being able to privately confer with counsel. Minneapolis Star & Tribune Company v. H.R.A., 310 Minn. 313, 251 N.W.2d 620, 624-625 (1976). The Court recognized that communications between a public body and its counsel in regard to threatened or pending litigation and discussions to facilitate settlement were situations in which the public need might in fact be injured if an opposing party could use such information for its private gain. Id. However, the Court noted that the privilege is to be cautiously invoked. Id. at 626.

In the instant case, the City of St. Louis Park and the State are claiming the privilege not only in regard to communications of each entity with its counsel, but also in regard to communications between counsel for the City and counsel for the State. The only Minnesota case of which the court is aware that has addressed the application of the privilege to attorney-client confidences shared between counsel representing different parties who have a joint interest in litigation was overruled after forty years. Leer v. Chicago, Milwaukee, St. Paul & Pacific Railway Company, 308 N.W.2d 305, 309 (Minn. 1981), cert. denied, 455 U.S. 939 (1982), overruling Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942). In Schmitt, the Minnesota Supreme Court held that the exchange of a privileged statement between counsel representing different defendants in a personal injury suit did not result in a waiver of the attorney-client privilege. 2 N.W.2d at 416. The subsequent overruling of Schmitt in Leer rested upon the Court's conclusion that the statement at issue in Schmitt was not privileged; not that the exchange of the statement resulted in waiver. 308 N.W.2d at 309. The Leer decision gives no indication that the Minnesota Supreme Court intends to abolish or restrict the concept of joint privilege as recognized under Minnesota law for forty years. Accordingly, the court finds that the comments in Schmitt are still useful in determining the scope of a joint privilege under Minnesota law.

In Schmitt, the Court indicated that a joint privilege would protect the exchange of privileged communications between counsel "engaged in maintaining substantially the same cause on behalf of other parties in the same litigation...." 2 N.W.2d at 417. In Schmitt the common cause was the exclusion of certain evidence. While the facts of the Schmitt case involved a joint privilege between counsel for defendants, the Court's comments and the rationale in recognizing such a privilege would be equally applicable to counsel for co-plaintiffs. One commentator has noted that the Schmitt decision gives a broad interpretation to joint privilege. It recognizes the existence of a joint privilege where there is any joint interest in litigation, even if the common interest is limited to a rather minor issue. Note, Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information, 63 Yale L.J. 1030, 1033 (1954). The facts of Schmitt indicate that the interests of the parties need not be identical. However, it would appear that the exchanges between counsel that would be recognized under Minnesota law as jointly privileged are only those which concern issues of some common interest made in furtherance of representing those interests in the same suit.

The court will recognize as jointly privileged otherwise privileged communications shared between counsel for the City and State in regard to matters of common interest made in furtherance of their prosecution of the 1970 State suit against Reilly Tar.

The work product doctrine was first delineated by the Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947) and is substantially codified in Federal Rule of Civil Procedure 26(b)(3). Rule 26 permits discovery of relevant, non-privileged documents and tangible things prepared in anticipation of litigation or for trial upon a proper showing of substantial need and undue hardship in obtaining substantial equivalents. However, "core" work product, i.e. the mental impressions, opinions and theories of an attorney concerning litigation, "can be discovered only in very rare and extraordinary circumstances." In re Murphy, 560 F.2d 326, 336 and n. 19. (8th Cir. 1977). Without such privacy accorded to an attorney's work, the court in Hickman observed that:

> "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 511.

In the instant suit, the parties appear to dispute whether the work product doctrine protects against discovery of intangibles.

Attorneys may be required under certain circumstances to reveal opinions in answering Interrogatories on behalf of clients under Fed. R. Civ. P. 33 or in responding to Requests for Admission under Fed. R. Civ. P. 36. These requirements must be

balanced with the limitations of such discovery contained in Rule 26. However, the court does not find that discovery by deposition permits wholesale inquiry into work product which would not be discoverable under Rule 26 if documents in which such product is memorialized were sought. The privacy recognized as necessary in Hickman is not so limited. 329 U.S. at 511. To permit unlimited discovery by deposition of counsel as to their thoughts, recollections and opinions would be anithetical to the integrity of the adversary system which the doctrine seeks to protect.

The work product protection does not cease with the termination of the litigation. Federal Trade Commission v. Grabier, ____ U.S. ____, 103 S.Ct. 2209, 2214 (1983). Consequently, work product generated in preparation of the 1970 state suit in issue in this case does not cease to be protected merely by the passage of time.

It has been determined by separate order that the allegedly inadvertent production of a series of documents by the City and State has resulted in the waiver of privilege otherwise associated with these documents. For purposes of the rulings under consideration, the court would clarify that the waiver is limited to matters and communications, the substance of which is reflected on the face of the documents. The court is also going to amend its affirmance of the Magistrate's July 9, 1984 Order in regard to documents 3600189 and 3000133 which the court held need not be produced as privileged. These documents have already been

produced to Reilly as reflected in deposition Exhibits No. 14 and No. 20. Any privilege has been waived by their production. Document 3600189 was ruled on twice in the July 9, 1984 order, once under identification as No. 3600189 and once under the heading July 14, 1971 letter.

The court is aware that the parties would like guidance for future discovery. However, the specific rulings on appeal do not readily lend themselves to tidy categories. In a number of instances, the form of the question accounts for different rulings on inquiries into the same subject. In other instances, the substance of matters and communications revealed in produced documents determines the scope of permissible inquiry. In spite of the inherent problems, the court will attempt to provide workable guidelines based on the underlying legal disputes.

As a general proposition, the court will permit inquiries related to Reilly Tar's defense of settlement asserted against the State of Minnesota in recognition that the court's August 1983 Order striking this defense was interlocutory and that discovery was not complete. However, the court does not concur with Reilly Tar that any privilege which may have existed as to any question propounded of Mr. Lindall in Appendix D has been waived by virtue of the State affirmatively placing in issue the scope of the 1970 lawsuit. This issue has not been raised by the state but by the defense of Reilly Tar. The court has further addressed specific inquiries of Lindall found in Appendix D, infra.

Inquiries which seek former counsels' interpretations of legal pleadings or statutes are impermissible. These inquiries invade both the "core" work product of counsel and the province of the court. The legal opinions of Messrs. Lindall, Popham and Macomber in regard to the phrase "waters of the state" as it appears in the pleadings and statutes are not at issue in this suit. No rare or extraordinary circumstance exist which would warrant such inquiries. The court would note that the inquiry of Wikre at 118:25-119:13 mentioned in the State's brief does not fall within this category.

The parties also dispute whether inquiry may properly be made of City and State counsel as to their knowledge of information regarding groundwater conditions in St. Louis Park contained in various reports compiled prior to the filing of the 1970 state suit. Specifically, the State and City contend that counsels' knowledge of the data reflected in Exhibits 3, 5, 6 and 73 to the Lindall deposition is protected by the work product doctrine. Inquiries regarding such knowledge have been propounded of Mssrs. Lindall, Popham, Macomber and Van de North. Mr. Van de North was also asked if he had seen a number of other documents prior to the meeting he had with Rolfe Worden on June 15, 1973. Counsel for the State and City were also asked generally if they had seen City and State files regarding the subject of groundwater at the time the complaints in the 1970 suit had been filed. In all but the latter inquiries, the specific documents themselves have been produced.

The work product concept does not protect against inquiries as to attorneys' knowledge of facts acquired in anticipation or preparation of trial, from whom such facts were learned or the existence or non-existence of documents. Hickman v. Taylor, 329 U.S. at 504. Casson Construction Co., Inc. v Armco Steel Corp., 91 F.R.D. 376, 384-385 (D. Kans. 1980); Wright & Miller, Federal Practice and Procedure, Civil § 2003. The court does not find that inquiries of counsel as to the existence of their knowledge of the deposition exhibits and facts therein are barred by work product immunity. In retrospect, it may appear that inquiries which seek to know whether the attorneys were aware of certain documents and facts at a given time invades their trial preparation. However, if such inquiries had been propounded in 1970 or 1973, the work product doctrine would not shield the attorneys from answering such questions. Thus, it cannot shield them now.

However, the court will not permit inquiries as to counsels' opinions as to the relevance of these documents or facts therein. This would be "core" work product and no extraordinary circumstances exist to warrant such discovery. The deposition testimony of Chris Cherches, former City Manager, Dale Wikre, MPCA geologist, and the produced documents are sources revealing knowledge of the positions of City and State in regard to the existence of groundwater pollution in the early 1970's.

The plaintiffs request the court to determine the period of time in which the City and State may claim a joint attorney-client privilege based upon their common interest in litigation.

The City and State jointly filed suit against Reilly Tar in state court in 1970. Reilly contends that any common interest between the City and State which might give rise to a possible joint privilege ended with the City's execution of the Purchase Agreement in April 1972 providing for the City's purchase of the Reilly site "as is". No privilege for communications between the City and State is claimed from the time the Hold Harmless Agreement was executed on June 19, 1973, whereby the City dismissed its state suit, to the discovery of carcinogenic substances at the Reilly site in October, 1974. In 1978 the State filed an amended complaint in the state court suit against Reilly and the City of St. Louis Park intervened in the suit. The parties do not raise the issue of privilege as to communications between the City and State occurring from 1978 to the present.

Since the City of St. Louis Park was not a party to the state suit from June 19, 1973 to 1978, the court does not find that otherwise privileged communications shared between City and State would be jointly privileged during this time. The language in Schmitt, explicitly limits its recognition of a joint privilege to communications between parties involved in the same suit. 2 N.W.2d at 417. The plaintiffs have cited no authority which indicates that Minnesota law would extend a joint privilege to matters outside of participation in litigation. In the absence of such authority, the court feels compelled to follow the general rule under Minnesota law that the attorney-client

privilege is to be cautiously and narrowly applied. Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d at 399 citing Minneapolis Star & Tribune Company v. H.R.A., 310 Minn. 313, 251 N.W. 2d 620 (1976).

The court has permitted inquiries of counsel to establish whether the City and State were taking antagonistic positions in the 1970 suit during the period of time between the execution of the Purchase Agreement and the Hold Harmless Agreement. In lieu of answers to these inquiries, the court will not rule in general as to whether communications would be jointly privileged. The court would note that the June 15, 1973 letter from Mr. Van de North to Rolfe Worden waives any joint privilege which may have pertained to City and State communications as to why the State declined to dismiss the state suit in 1973. The State produced and relied upon this exhibit in support of its August 1983 motion to strike Reilly Tar's affirmative defense of settlement. The court would further note that it does not find that the City's cross claim in this suit necessarily establishes that the City and State were taking antagonistic positions between April, 1972 and June 19, 1973. Of course, to the extent that the City introduces into evidence in this suit privileged communications between the City and State to establish its cross claim, those communications will no longer be privileged.

Another area of contention involves inquiries of St. Louis Park counsel and State counsel with respect to terms contained in the 1972 Purchase Agreement and the 1973 Hold Harmless Agreement

between the City and Reilly Tar. The court concurs with Reilly Tar that the agreements themselves and final terms would not be trial preparation materials subject to work product protection. This does not mean that discussions leading up to their execution could not reflect trial strategies or tactics. Furthermore, the court does not concur with Reilly that all attorney-client communications preceding execution of the agreements of necessity would have been intended to be conveyed to third parties, and thus not privileged.

The court does not find that either work product immunity or privilege bars inquiries as to the basis for the provision in the Purchase Agreement that the City would deliver a dismissal from the State at the closing. To the extent that the basis for this provision involves communications between City and State, which they now claim to be privileged, the court finds that the inclusion of this term in the 1972 Purchase Agreement belies any intent that such communications were intended to remain confidential. If Reilly had inquired in 1972 as to the City's basis for offering this provision in the Purchase Agreement, it is difficult to believe that the City would have been expected or required to remain silent on the grounds of privilege.

Both the City and State shared a common if not identical interest as co-plaintiffs in the City's purchase of the Reilly plant as at least a partial means of resolving pollution issues in the 1970 suit. Apart from inquiries directed to the dismissal provision in the 1972 Agreement, the court finds that a joint

privilege bars wholesale inquiry of state counsel in regard to negotiations for the purchase of the Reilly site. As an example, Lindall's knowledge that negotiations were taking place or his knowledge of terms in the executed Purchase Agreement would not involve confidential communications. However, inquiries into Lindall's knowledge of the specific status of the negotiations at a given time or his understanding as to the effect of the negotiations, apart from his knowledge revealed at public meetings, will be barred as privileged.

Reilly is also seeking to discover the intent of the City as to the Purchase Agreement and the Hold Harmless Agreement by inquiring of Mssrs. Popham and Worden as to their understanding of certain terms contained in these agreements. The affidavits of Kathleen Martin, counsel for the City, and Tom Reiersgard, former Reilly Tar counsel, are contradictory as to the level of involvement of Mssrs. Popham and Worden in the negotiations of these agreements. Rolfe Worden has testified in regard to discussions he had with counsel for Reilly Tar in regard to the Hold Harmless Agreement. Of course any discussions with Reilly would not be privileged. Chris Cherches, former City Manager, and Mayor Frank Pucci, who signed these contracts on behalf of the City, have testified to the City's intent in entering these agreements. The court finds that this obviates the need to make such inquiries of Mssrs. Popham and Worden. If any other City officials or employees have knowledge bearing on the City's intent, Reilly should have access to such information. Apart

from inquiries directed toward finding such sources of information, the court does not find that inquiries of counsel as to their understandings are reasonably calculated to lead to the discovery of admissible evidence.

Based upon the foregoing, IT IS ORDERED that the Magistrate's rulings of August 14, 1984 are affirmed as not being contrary to law with the exception of the following rulings ordered by the Court:

Lindall

Appendix C	
141:10-141:15	Objection overruled
141:18-142:10	Objection overruled
142:12-142.16	Objection overruled
Appendix D	
85:14-85:21	Objection overruled
85:23-86:2	Objection overruled
93:14-93:17	Objection sustained
95:2-98:19	Objection overruled
141.10-141:15	Objection overruled
141:18-141:10	Objection overruled
142:12-142:16	Objection overruled

Van de North

Appendix D	
20:19-20:25	Objection overruled
21:2-21:9	Objection overruled
43:6-43:11	Objection sustained

Popham

Appendix A	
11:6-11:16	Objection overruled
22:21-22:25	Objection overruled
Appendix C	
22:21-22:25	Objection overruled
54:2-54:8	Objection overruled
Appendix D	
72:2-77:9	Objection overruled

Worden

Appendix B	
25:25-26:3	Objection overruled
Appendix C	
10:24-11:1	Objection sustained
11:3-11:9	Objection sustained
Appendix D	
13:11-14:8	Objection overruled
14:9-14:12	Objection overruled
14:14-14:17	Objection overruled
14:22-14:24	Objection overruled
25:25-26:3	Objection overruled

Macomber

8:21-9:4	Objection overruled
9:5-9:12	Objection overruled
9:22-10:3	Objection overruled
10:17-10:20	Objection overruled

IT IS FURTHER ORDERED that this court's Order of September 7, 1984 is amended as follows: documents 3600189, the July 14, 1971 letter, and 3000133 have been produced to Reilly Tar & Chemical Company and any privilege as to these documents is waived.

Dated: December 17, 1984.

Paul A. Magnuson
United States District Judge